NO. 83-5799

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

CLIFTON CHARLES RUSSELL, JR.,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS COMMITTED ERROR OF CONSTITUTIONAL MAGNITUDE IN DENYING PETITIONER'S MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS?

II. WHETHER THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR IN FAILING TO DEFINE THE WORD "DELIBERATELY" AT THE PUNISHMENT PHASE?

III. WHETHER THE CONSTITUTION REQUIRES THAT THE TEXAS DEATH PENALTY SCHEME PROVIDE FOR PROPORTIONALITY REVIEW?

IV. WHETHER THE TEXAS CAPITAL SENTENCING STATUTE ADEQUATELY ALLOWS FOR CONSIDERATION OF MITIGATING CIRCUMSTANCES?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is not yet published, is reproduced in Appendix A to the Petition for WRit of Certiorari. The Texas Court of Criminal Appeals denied the Motion for Leave to File Petitioner's Motion for Rehearing without written order on September 28, 1983.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment of the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .;

the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted on December 7, 1979, in Harris County, Texas for the murder of Hurbert Otha Tobey, while in the course of attempting to commit robbery. Trial began on April 14, 1980, and on April 17, 1980, the jur found Petitioner guilty of the capital offense. On April 18, 1980, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc. Ann. (Vernon). Accordingly, punishment was assessed at death. Petitioner appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which on July 6, 1983, affirmed the conviction and sentence. Rehearing was denied on September 28, 1983.

STATEMENT OF FACTS

Petitioner's statement of facts of the guilt stage of the trial is essentially correct. The pertinent facts are, however, more comprehensively set out in the opinion of the court below. (See, Appendix A to the Petition for Writ of Certiorari, 1-7).

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of

well-settled constitutional principles to the facts involved herein. This Court is without jurisdiction to consider Petitioner's proportionality claim because Petitioner has not presented the precise issue raised herein to the Texas Court of Criminal Appeals.

Petitioner's claim that the court below committed constitutional error in failing to extend his time for filing a transcription of the jury voir dire is without merit. The record clearly reflects that Petitioner failed to comply with Texas law by timely requesting that the transcript be included in the record on appeal. Further, the issue of whether the futility of presenting a claim can alone excuse a failure to comply with existing state procedural requirements has previously been addressed by this Court and rejected in Engle v. Isaac, 456 U.S. 107 (1982).

In Pulley v. Harris, 52 L.W. 4141 (Jan. 23, 1984), this Court held that proportionality review is not constitutionally required in every death penalty case. In so doing, the court expressly reaffirmed the Texas capital sentencing statute.

The issue of whether the Texas capital sentencing statute adequately allows for consideration of mitigating circumstances was previously decided by this Court in Jurek v. Texas, 428 U.S. 262 (1976). Further, this Court has expressly recognized that specific standards for balancing aggravating factors are not constitutionally required.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefore. Petitioner has advanced

no special or important reason in this case and none exists. Further, this case presents only the question of whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented here.

II.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S PROPORTIONALITY CLAIM BECAUSE IT WAS NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

The cases are legion that this Court will not decide issues raised for the first time on petition for writ of certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the Court below. E.g., Illinois v. Gates, 103 S.Ct. 2317, 2321-23 (1983); Tacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Store reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and come to the conclusion that the Judiciary Act of 1789, 20, Section 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Godchaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919). Petitioner contends that the Texas death penalty scheme is constitutionally invalid because it fails to provide a procedure for proportionality review, expressly conceding that this contention was not raised in the court below. Thus, Petitioner's claim was not adequately presented to and decided by the state court below.

Respondent submits that in view of Petitioner's failure to sufficiently and properly raise the issues presented here below, the failure of the state court to pass on these issues, the desirability of giving the state the first opportunity to address the issues, the application for certiorari should be denied for want of jurisdiction. Cardinale v. Louisiana, 394 U.S. at 439.

III.

THE TEXAS COURT OF CRIMINAL APPEALS COMMITTED NO CONSTITUTIONAL ERROR IN DENYING PETITIONER'S MOTION TO EXTEND THE TIME FOR FILING A PORTION OF THE STATEMENT OF FACTS.

Texas law requires that any party who desires to have all or any portion of a transcription of the court reporter's notes included in the record, shall so designate with the clerk in writing and within 20 days of giving notice of appeal. Tex. Code Crim. Proc. Ann. art. 40.09(2)(4) and (5) (Vernon). The state shall file its designation within 30 days after the giving of notice of appeal. Tex. Code Crim. Proc. Ann. art. 40.09(2) (Vernon). After competion of the record, each party is notified by certified or registered mail and is given 15 days after the mailing of such notice to file objections. Tex. Code Crim. Proc. Ann. art. 40.09(7) (Vernon). No objections having been filed, the record is approved and filed with the clerk of the trial court. Tex. Code Crim. Proc. Ann. art. 40.09(8) (Vernon).

The Texas courts have held that the burden is on the criminal defendant to present a complete record of the trial proceedings. Bradley v. State, 564 S.W.2d 727, 730 (Tex.Crim.App. 1978). The notes of the jury voir dire is not a matter that is mandatorily included in the appellate record. Mills v. State, 508 S.W.2d 823 (Tex.Crim.App. 1974); Broussard v. State, 471 S.W.2d 48 (Tex.Crim.App. 1971).

The record reflects and Petitioner concedes that no request was made by Petitioner in compliance with state law to include transcription of the voir dire testimony in the record on appeal

(Tr. 150-51). [1] The record further reflects that on June 30, 1980, [2] Petitioner was notified of the completion of the record (Tr. 153); that no objections were filed by Petitioner; and that the record was approved on July 16, 1980 (Tr. 154-55).

On October 15, 1980, Petitioner filed his "Motion to Extend the Time for Filing a Portion of the Statement of Facts," alleging that at the time he filed his designation of material for inclusion in the record, Adams v. Texas, 448 U.S. 30 (1980), had not been decided and under the existing Texas law, any challenges to the exclusion of two prospective witnesses on the basis of Witherspoon [3] error would have been futile (Petition for Writ of Certiorari, Appendix F). Petitioner's motion was denied by the Court of Criminal Appeals on October 17, 1980 (Petition for Writ of Certiorari, Appendix G).

Petitioner's contention that he was denied effective appellate review through no fault of his own rings hollow in light of the foregoing. Petitioner failed to comply with state law by requesting that a transcription of the jury voir dire be included in the record on appeal and made no objections to the designated record within the time period prescribed by state law.

Further, the question of whether the futility of presenting a claim can alone excuse a failure to comply with existing state procedural requirements was recently addressed by this Court in Engle v. Isaac, 456 U.S. 107, 130 (1982), in the context of applying a procedural default:

> We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to his

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1/ "Tr." refers to the transcript of Petitioner's 1980 trial.

2/ Adams v. Texas, supra, was decided by this Court on June 25, 1980.

3/ Witherspoon v. Illinois, 391 U.S. 570 (1968).

> claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting Sykes.

Petitioner has not presented any claim of constitutional magnitude.

IV.

THE STATE COURT DID NOT COMMIT ERROR OF CONSTITUTIONAL MAGNITUDE IN REFUSING PETITIONER'S REQUESTED JURY INSTRUCTION.

Petitioner contends that the trial court committed constitutional error in failing to define the word "deliberately" in the special issue number one at the punishment stage. He contends that by failing to give the requested instruction, the trial court failed to channel the jury's discretion in determining whether the death sentence should be imposed. Apparently, Petitioner is arguing that by failing to instruct the jury as to the definition of "deliberately", the trial court failed to guide the jury's consideration of the aggravating and mitigating circumstances.

In Zant v. Stephens, __ U.S. __, 103 S.Ct. 2733, 1742 n.13 (1983), this Court reiterated its position in Jurek that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required. The Court again recognized that the jury's discretion is channeled by the narrowing categories of murders for which the death sentence may be imposed. Respondent submits that Petitioner's claim of constitutional error is meritless.

V.

PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY MANDATED.

The question of whether the Constitution requires the Texas death penalty scheme to provide proportionality review has recently been addressed by this Court. In Pulley v. Harris, 52 L.W. 4141 (Jan. 23, 1984), this Court held that comparative proportionality review is not constitutionally required in every

case in which the death penalty is imposed and the defendant requests it. In so holding, the Court expressly reaffirmed the validity of the Texas capital sentencing procedure, expressly noting:

> Texas' capital sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution. [Jurek v. Texas, 428 U.S. 262, 276 (1976)].

52 L.W. at 4144. Petitioner's claim that proportionality review is constitutionally mandated is without merit.

VI.

THE ISSUE OF WHETHER THE TEXAS CAPITAL SENTENCING STATUTE ADEQUATELY ALLOWS FOR CONSIDERATION OF MITIGATING CIRCUMSTANCES WAS SETTLED BY THIS COURT IN JUREK V. TEXAS, 428 U.S. 262 (1976).

In Jurek v. Texas, 428 U.S. 262 (1976), this Court upheld the Texas capital-sentencing statute against constitutional attacks under the Eighth and Fourteenth Amendments. The Court held that because Texas has severely limited the statutory offenses for which capital punishment might be imposed to offenses involving at least one aggravating circumstance, has allowed for mitigating circumstances relating to the individual defendant at the punishment stage, and has provided for prompt judicial review, "Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under the law" and the "system serves to assure that sentences of death will not be 'wantonly' or 'freakishly'

imposed." Id. at 276. With respect to the special issue number two, Jurek held:

> The second Texas statutory question asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death . . . In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:
>
> > "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."
>
> . . .
>
> Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it.

428 U.S. at 272-73, 92 S.Ct. at 2956-57 (citation omitted).

Petitioner's contention that the sentencing body was precluded from hearing mitigating evidence because the Texas Court of Criminal Appeals failed to discuss the mitigating factors in addressing whether the second special issue is constitutionally vague and whether the evidence is sufficient to support the affirmative finding as to the probability of future criminal acts of violence is frivolous. The record reflects and Petitioner concedes that Petitioner presented evidence to the jury at the punishment phase of Petitioner's lack of any prior criminal history, his age and his childhood background.

(Petition for Writ of Certiorari at 5-10, 27). Petitioner completely fails to allege or demonstrate any mitigating evidence which the trial court precluded the defense from presenting to the jury or any evidence that the trial court refused to consider. His reliance on Eddings v. Oklahoma, 455 U.S. 104 (1982) is misplaced.

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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